



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2021-0010]

Surface Transportation Project Delivery Program; Utah Department of Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; Request for comment.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) and other Federal environmental laws for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the fourth and final audit report for the Utah Department of Transportation (UDOT).

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Mail or hand deliver comments to Docket Management

Facility: U.S. Department of Transportation, 1200 New Jersey

Avenue, SE., Room W12-140, Washington, DC 20590. You may also

submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received

will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically.

Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Ms. Lana Lau, Office of Project Development and Environmental Review, (202) 366-2052, Lana.Lau@dot.gov, or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366-1345, Patrick.c.Smith@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be viewed online at www.regulations.gov using the docket number listed above. Electronic retrieval help and guidelines are available on the Website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Website at www.FederalRegister.gov and the U.S. Government Publishing Office's Website at www.GovInfo.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed in lieu of FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the *Federal Register* on November 16, 2016 (81 FR 80710), with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The FHWA must make the results of each audit available for public comment. The FHWA published the first audit report of UDOT compliance on September 17, 2018 (83 FR 46992), the second report on November 13, 2019 (84 FR 61680), and the third report on September 17, 2020 (85 FR 58102). This notice announces the availability of the fourth and final audit report for UDOT and solicits public comments.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23

U.S.C. 327; 23 CFR part 773.

Stephanie Pollack,
Deputy Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
Draft FHWA Audit of the Utah Department of Transportation
July 1, 2018 – June 30, 2019**

Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) fourth audit of the Utah Department of Transportation's (UDOT) National Environmental Policy Act (NEPA) review responsibilities and liabilities that FHWA has assigned and UDOT has assumed pursuant to 23 U.S.C. 327. Throughout this report, FHWA uses the term "NEPA Assignment Program" to refer to the program codified at 23 U.S.C. 327. Pursuant to 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT's NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals in Utah. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT's environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. The scope of this audit does not cover the CE Program Assignment responsibilities.

As part of FHWA's review responsibilities under 23 U.S.C. 327, FHWA formed a team (the "Audit Team") in August 2020 to plan and conduct an audit of NEPA responsibilities UDOT assumed. The Audit Team conducted its review during the period from November 9 to December 2, 2020. As part of this audit, the Audit Team reviewed UDOT's NEPA project files, UDOT's response to FHWA's pre-audit information request (PAIR), UDOT's NEPA Assignment Self-Assessment Report, UDOT's NEPA Quality Assurance/Quality Control (QA/QC) Guidance, and UDOT's NEPA Assignment Training Plan. The Audit Team conducted videoconference interviews with four

members of UDOT central office staff, six of UDOT's legal counsel (one current Assistant Attorney General assigned to UDOT, one former Assistant Attorney General assigned to UDOT, and four outside counsel), three staff members from the U.S. Environmental Protection Agency, and two staff members from the U.S. Fish and Wildlife Service (FWS) as part of the audit.

Overall, the Audit Team found that UDOT continues to successfully carry out its DCE, EA, and EIS project review responsibilities. The UDOT has also made efforts to respond to the FHWA findings from the third audit, including improving document management and QA/QC procedures. In the third audit, the Audit Team had found that UDOT issued an environmental document without a final legal sufficiency finding, and observed that there were ways UDOT could improve their training.

In this fourth and final audit, the Audit Team identified four observations and two successful practices. The Audit Team finds UDOT is carrying out the responsibilities it has assumed and is in substantial compliance with the provisions of the MOU. This report also concludes with the status of FHWA's non-compliance observation from the third audit review, including any UDOT self-imposed corrective actions. After the fourth year of UDOT's participation in the program, FHWA will continue to monitor UDOT's compliance with the terms of this MOU, in accordance with 23 U.S.C. 327(h).

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain FHWA approvals. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities UDOT

has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

Audits are the primary mechanism through which FHWA oversees UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the *Federal Register*.

Through this fourth and final audit, FHWA will satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. This report summarizes the results of the fourth audit in Utah and includes a summary discussion that describes progress since the last audit. This audit is the last of the required audits.

Scope and Methodology

The MOU (Part 3.1.1) states that “[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the U.S. Department of Transportation Secretary's responsibilities for compliance with the NEPA, 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 C.F.R. parts 1500-1508, DOT Order 5610.1C, and 23 CFR 771 as applicable.” Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and

regulations commits UDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU.

The Audit Team consisted of NEPA subject matter experts from the FHWA Utah Division, FHWA Resource Center, the Volpe Center, FHWA Headquarters, and FHWA Office of the Chief Counsel. These experts received training on how to evaluate implementation of the NEPA Assignment Program.

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT's responses to the PAIR, and UDOT's self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement. In particular, the Audit Team reviewed UDOT's process and procedures for conducting environmental re-evaluations.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, appropriate or not. The Audit Team reviewed 20 NEPA Project files with DCEs, EAs, EISs, and re-evaluations, representing all projects with decision points or other actionable items between July 1, 2019, and June 30, 2020. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 25 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the UDOT staff.

The Audit Team conducted four interviews with UDOT environmental staff, one virtual interview with staff from the U.S. Environmental Protection Agency (EPA), one interview with staff from the FWS, two interviews with UDOT's outside legal counsel, and one interview with legal counsel from the Utah Attorney General's office. All interviews were conducted as videoconference interviews.

Throughout the document reviews and interviews, the Audit Team verified information regarding the UDOT NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such the Audit Team finds UDOT is substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items the Audit Team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared

to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Within each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their NEPA Assignment Program. The FHWA and UDOT will continue to work together to monitor UDOT's compliance with the terms of this MOU, as required by 23 U.S.C. 327(h).

Program Management

Successful Practice # 1

The Audit Team identified one of UDOT's project Websites which included detailed information about the proposed noise impact analyses, traffic noise abatement measures, and the proposed relocation of the existing noise barriers as a successful practice. The noise impact and abatement information presented to the public was comprehensive and easy to understand.

Observation # 1

Section 5.1.4 of UDOT's NEPA Assignment MOU outlines an interagency planning and coordination protocol to make sure that all programmatic agreements reflect UDOT's new roles and responsibilities under NEPA Assignment. The Audit Team observed that UDOT's Section 106 programmatic agreements with four Tribal governments predate NEPA Assignment, and they do not reflect UDOT's assigned roles and responsibilities. We recommend that UDOT reach out to these Tribal governments and implement the interagency planning and coordination provisions of Section 5.1.4, which may include amending the programmatic agreements or obtaining a "written consent". The recommended path forward would enable UDOT to clarify its assigned roles and responsibilities during Section 106 consultations.

The overall consistency across all five of the Section 106 programmatic agreements is important to clarify the organizational roles and responsibilities between UDOT and FHWA for both Section 106 and Government-to-Government consultations, resulting in more predictable lines of communication, more productive and meaningful interagency dialogue with the Tribes, and a positive reinforcement of FHWA's retained Tribal trust responsibilities.

Observation # 2

In the course of reviewing the most recent Manual of Instruction (MOI), the Audit Team identified several areas that do not address the most recent requirements and guidelines associated with the Fixing America's Surface Transportation Act; FHWA's 2019 Re-evaluation Q&A Guidance; Moving Ahead for Progress in the 21st Century Act (MAP-21) Section 1319 interim guidance relating to the appropriate use of the combined Final Environment Impact Statement/Record of Decision (FEIS/ROD) documents; FHWA's 2011 Environmental Justice and NEPA guidance for identifying, disclosing and mitigating impacts to environmental justice communities; or FHWA's October 2018 memorandum addressing activities that may be completed prior to issuance of a Notice of Intent to prepare an EIS. During interviews, UDOT informed us that they make regular updates to the MOI, as needed. However, these examples illustrate that the MOI would benefit from a regularly scheduled, comprehensive review to ensure that it reflects current national policy and guidance.

Documentation and Records Management

Successful Practice # 1

During this audit period, the Audit Team reviewed re-evaluations for two EIS projects that appeared to use the same format. While it is not explicitly required by the MOI, UDOT did appear to use a standard procedure for these re-evaluations. For example, both included a Summary of Re-evaluation Analysis Table that functions like an

environmental checklist. This table creates a standard process for looking at changes in both the magnitude of project impacts, as well as project scope modifications.

Observation # 1

The team reviewed multiple re-evaluations for the West Davis Corridor Project. Each individual re-evaluation addressed the changes on that portion of the larger project. The FHWA suggests UDOT also add language that summarizes the changes across all the re-evaluations, such as providing a listing of all the related re-evaluations and a statement correlating them, to clearly demonstrate and document that UDOT has considered impacts across the entirety of the project.

Quality Assurance/Quality Control

The UDOT has made improvements to its QA/QC procedures. These improvements are discussed in the Legal Sufficiency section of this report.

Legal Sufficiency

During the audit period outside counsel issued three findings of legal sufficiency per the requirements of 23 CFR 771.125(b) and 23 CFR 774.7(d), copies of which were provided to the Audit Team. These include legal sufficiency reviews of one EIS and two Section 4(f) evaluations. The UDOT has continued using the legal sufficiency process it put in place for both Section 326 CE and Section 327 NEPA Assignment; that is, contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation.

Since the signing of the initial FHWA-UDOT MOU for the NEPA Assignment Program in January 2017, no lawsuits have been filed against NEPA-assigned projects in the State of Utah.

Training

The UDOT has continued to develop an annual training plan, in compliance with Section 12.2 of the MOU.

Performance Measures

The UDOT has continued to assess its performance as required under the terms of the MOU. The UDOT's annual self-assessment report indicates that they are meeting their performance targets. The process of, and results from, the State's self-assessment have been an important factor in the improvement of UDOT's NEPA Program.

Observation # 1

Section 10.2.1.C.i of the MOU requires UDOT to assess change in and ensure effective communication among UDOT, Federal and State resource agencies resulting from assumption of responsibilities under the MOU.

In interviews, resource agency staff at the EPA and the FWS stated that overall they have a good working relationship with UDOT staff. Some FWS staff indicated that they could utilize additional information on the differences between the 23 U.S.C. 326 (CE Assignment) program and the 23 U.S.C. 327 (NEPA Assignment) program. The audit team also learned that neither FWS nor EPA had responded to UDOT's annual resource agency survey. These are examples of where UDOT's program may benefit from more consistent, program-level discussions with resource agencies to ensure that all parties understand their respective roles and responsibilities, as well as the provisions of the 326 and 327 programs. Stronger managerial-level communications with the resource agencies may increase their understanding of the importance of the survey and improve the response rate.

Non-Compliance Observation

Non-compliance observations are instances where the team found UDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or UDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where UDOT has failed to maintain technical competency, adequate personnel, and/or financial resources

to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects UDOT to develop and implement corrective actions to address all non-compliance observations.

The Audit Team did not identify any non-compliance observations during this audit.

Follow-up to Previous Audit Findings

The FHWA reported a non-compliance observation relating to UDOT not complying with the State's environmental review procedures as a part of Audit # 3.

2019 Audit # 3 - Issuing a document without final legal sufficiency finding

As noted earlier, in response to the 2019 audit finding that legal sufficiency review documentation was not provided prior to approval of a project FEIS, UDOT and outside counsel implemented a more formalized system by instituting a Legal Sufficiency Review Form to be completed by outside counsel. The form ensures a record that the review occurred. This form has already been used for legal sufficiency reviews during this audit period.

Next Steps

The FHWA provided this draft audit report to UDOT for a 30-day review and comment period. The Audit Team considered UDOT comments in developing this draft audit report. The FHWA will publish this notice in the *Federal Register* for a 30-day comment period in accordance with 23 U.S.C. 327(g)(2)(A). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the *Federal Register*.